

***United States Court of Appeals
for the Second Circuit***

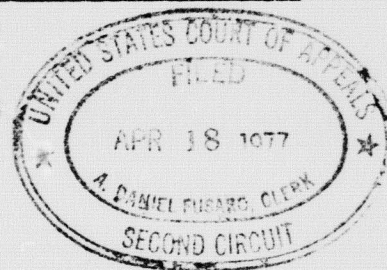


**BRIEF FOR
APPELLANT**

77-6027
77-6031

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-6027, 77-6031



CAPITAL REGION CITIZENS COMMITTEE, et al.,

Plaintiffs-Appellants,

v.

JOHN A. VOLPE, SECRETARY OF TRANSPORTATION
OF THE UNITED STATES, et al.,

Defendants-Appellees.

BRIEF OF APPELLANTS
CAPITAL REGION CITIZENS
COMMITTEE, et al.

April 15, 1977

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PRELIMINARY STATEMENT

This is an appeal from a District Court order (A.525)* granting partial summary judgment** to the defendants ("appellees") and vacating a November 14, 1973 preliminary injunction (A729) obtained by plaintiffs ("appellants") which prevented appellees from using federal funds to construct a substantial portion of a proposed Interstate highway, known as I-88, from Binghamton to Schenectady, New York. The 1973 preliminary injunction was based upon appellees' violation of certain federal statutes, principally the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§4321 et seq.

The order here on appeal was entered on September 28, 1976 in the United States District Court for the Northern District of New York and followed an unreported September 27, 1976 decision (A527) of Judge Edmund Port.

Judge Port erred in granting summary judgment to the appellees because a genuine issue of material fact existed, namely, whether and to what extent federal officials participated in the preparation of the environmental impact statements covering I-88 as required by NEPA.

*The parties have agreed upon a Joint Appendix. Page references to the Joint Appendix are made "A ". References to portions of the Record not included in the Joint Appendix are made "R ".

**A statement under Rule 54(b) of the Federal Rules of Civil Procedure permitting this appeal has been made by the District Court (A547).

In addition, regardless of who prepared the environmental impact statements, they were substantively inadequate to comply with NEPA as a matter of law. Judge Port's finding to the contrary, upon which the summary judgment was grounded, was clearly erroneous.

Finally, in view of the inadequacy of environmental impact statements, and the open questions as to the legality of the method of their preparation, the November 14, 1973 preliminary injunction should have remained in place.

This brief is filed on behalf of all appellants except for appellants The Richmondville-Property Owners Committee and New York State Coalition for Sane Transportation who are separately represented and filing a separate brief. Appellants herein also join in that separate brief.

QUESTIONS PRESENTED

1. Where (a) the complaint alleged an improper delegation of federal responsibilities under NEPA to others, (b) environmental impact statements covering a proposed federally funded interstate highway were admittedly prepared by a state agency and (c) the only evidence of federal participation was contained in self-serving affidavits of federal officials which showed only a formless, tangential federal involvement, did a genuine issue of material fact exist for trial as to whether and to what extent responsible federal officials actually participated in any meaningful way as required by NEPA in the environmental impact statement preparation process?

2. Are environmental impact statements adequate under NEPA when they address a proposed 123 mile Interstate highway (a) without a comprehensive review of the cumulative and long range regional effects of the entire integrated land use, transportation and construction program encompassed by the proposal, (b) without conscientiously addressing alternatives, and (c) without specifically disclosing the full impacts on the human impacts on the human environment of the proposal?

3. When (a) a preliminary injunction is granted against defendants on the grounds that triable issues exist on which plaintiffs have shown a high probability of success, (b) no appeal is taken from the preliminary injunction order, (c) no

trial is ever had, (d) no change occurs either in the threatened injury to plaintiffs or the hardship to defendants and (e) the remainder of the circumstances surrounding the preliminary injunction order remain substantially the same, is it an improvident exercise of discretion to vacate the preliminary injunction?

FACTS

This action was commenced by the filing of a complaint (A5) by appellants in the District Court on May 18, 1972. The complaint alleged that a number of statutes and constitutional provisions were being violated by appellees in connection with the planning for and funding and construction of I-88. Injunctive and declaratory relief was sought.

The Parties

The appellants are private individuals and organizations and one town who would be adversely affected in various ways by the construction of I-88.

The appellees are officials of the United States Department of Transportation, the Federal Highway Administration and The New York State Department of Transportation. The federal appellees shall be referred to as FHWA and the state appellees as DOT.

The History of I-88

In 1968 DOT applied to FHWA, under a 1968 statutory expansion of the Interstate Highway System (23 U.S.C. §103(e)(3)), for inclusion in the system of a 145 mile freeway from Binghamton, New York to the Vermont state line northeast of Albany, New York* (A288).

*Ninety percent of the cost of an Interstate Highway is paid for by the federal government.

On December 13, 1968 FHWA gave a tentative conceptual approval to a 123 mile portion of this freeway: I-88 (A288). I-88 would link I-81 (a north-south road from Pennsylvania to Canada) near Binghamton with a connection to I-90 (the New York Thruway) near Schenectady.

For administrative purposes, I-88 was divided into about 25 short segments of two to six miles in length (A288). Each segment was assigned a Project Identification Number ("PIN"). DOT then began moving the I-88 PINs through the complex scheme of sequential FHWA processes and approvals leading to the final commitment of federal funds for construction.* This final commitment occurs when the FHWA grants Plans, Specifications and Estimates ("P,S&E") approval under 23 U.S.C. §106 for a PIN.

By the time this action was commenced most of the PINs along the western 50 miles of I-88 (between Binghamton and Oneonta) had made substantial progress through the FHWA processes and construction on two PINs had actually begun (A319).

However, no environmental impact statement under NEPA had been prepared covering all of I-88, and it appeared that all environmental reviews were being conducted exclusively by DOT under a delegation of responsibility from FHWA. In addition, these environmental reviews were being conducted only with respect to segments of I-88 and not with respect to I-88 as a whole.

*NEPA became effective on January 1, 1970 adding an additional dimension to the FHWA processes.

In the fall of 1972, the appellees moved for a summary judgment to rid themselves of this lawsuit (R61, 68). Judge Port did not decide the motion until November 14, 1973 following a motion by the appellants for a preliminary injunction (R134). By that time construction had begun on nine PINs.

The 1973 Preliminary Injunction

On November 14, 1973 Judge Port enjoined* the construction and federal funding of a major portion of I-88 (A279-320) finding that appellants had

"a probability of success on at least some of the issues raised." (A299).

As to these issues Judge Port stated:

"In the discretion of the court, it seems more appropriate that the other claims asserted by the plaintiffs be disposed of after a full exploration of the facts on a hearing. '(A) thorough probing, in-depth review is preferable to summary judgment which is an unusually inappropriate vehicle for the determination of the issues.' There should be a trial to explore the probable issues involving environmental analysis, such as (a) whether environmental impact statements should be filed where they are not; (b) whether statements already filed are adequate; (c) whether the state or federal agency was the party preparing these statements; (d) whether the segmental submission procedure impedes the environmental analysis function under NEPA; [and other issues]" (A297-298).

*Three of appellants' claims in the complaint, not here relevant, were dismissed at the same time (A296-297).

The Court divided the PINs into three groups for purposes of fashioning the equitable remedy. "Group I" contained segments which had not received P, S & E approval and were therefore only in the planning stages (no right-of-way acquisition, federal funding commitments, or construction). "Group II" included four highway segments in two contiguous stretches (a "bypass" of Oneonta, New York and two segments in Broome County) which had P, S & E approval and were partially under construction, but which had not had environmental impact statements filed. Both Groups I & II were placed under preliminary injunction "pending the trial and determination of this case".

"Group III" were segments which had received P, S & E approval, had environmental impact statements prepared, and were partially constructed. Consequently those PINs in Group III were not included within the 1973 injunction.

Changes in the 1973 Preliminary Injunction

The preliminary injunction was modified three times before the final order under review on this appeal dissolving the preliminary injunction and granting summary judgment.

The first modification (which was unopposed) by Order of December 26, 1973 amended the injunction by excluding two PINs which were erroneously placed in "Group I".

Defendants requested a second modification which was granted May 24, 1974 (R. 348) which excluded PINs 9357.19 and 9357.20, the "Oneonta By-Pass" from the injunction against disbursement of federal funds. This motion was also unopposed

by Plaintiffs because the Oneonta By-Pass was then under construction and nearly 90 percent completed.

A third modification was requested by Defendants and granted by Order of January 28, 1976 releasing two partially completed segments, PINs 9357.00 and 9357.01 in Broome County (R. 424). Plaintiffs opposed the modification of the injunction as to these segments, but the Court believed the equitable balance tilted towards defendants as to these partially constructed segments and lifted the injunction as to them.

Thus, after these three modifications of the 1973 preliminary injunction, only those PINs in the "Group I" list were still subject to the preliminary injunction against federal funding or P, S & E approval:

a) a 45 mile group of 10 contiguous segments, PINs 9357.08 through 9357.17, in rural Otsego and Schoharie Counties. ("Otsego/Schoharie segment").

b) an 18 mile group of four contiguous segments, PINs 1357.01 through 1357.04, which would be the proposed northeastern terminus of Interstate 88 in Schenectady County. ("northeast terminus segment").

c) a three mile segment, PIN 9357.18, which would be the proposed southwestern terminus of I-88 near Port Crane in Broome County connecting the present Binghamton terminus of I-88 with an existing north-south Interstate, I-81. ("southwest terminus").

Other Events Occur

On August 9, 1975, Public Law 94-83 amending NEPA became effective. The entire text of this statute is annexed to this brief. As discussed below (pp 18-21), Public Law 94-83 was intended to clarify the relationship between DOT and FHWA with respect to the preparation of environmental impact statements under NEPA and explain how much delegation of federal responsibilities to state officials was permissible.

On or about February 13, 1976 DOT published as an insert to the environmental impact statement prepared for the Broome County PINs a statement purporting to discuss the comprehensive impact of the entire I-88 program. As discussed below, (pp this insert was woefully inadequate.

On or about June 15, 1976, DOT published an environmental impact statement purportedly covering the northeast terminus segment.

At that time, as to the "Group I" segments still enjoined, the environmental impact statement situation was as follows:

a) The Otsego/Schoharie segment was covered by a 1972 environmental impact statement prepared by DOT (Exhibit 133). This identical statement was before the District Court when the 1973 preliminary injunction was issued and had not been amended or supplemented since that time;

b) The northeast terminus was covered by the June 15, 1976 statements;

c) No statement dealt specifically with the southwest terminus; and

d) The insert to the February 13, 1976 Broome County statement purportedly was the comprehensive statement covering all of I-88.

The Summary Judgment Motion

Thereupon, DOT moved for a further modification of the 1973 preliminary injunction (A321) arguing that all of the NEPA issues left open in 1973 had been resolved without the need for a trial and claiming that:

a) Environmental impact statements were in existence for all segments of I-88 save only the small southwestern terminus (A446);

b) The statements were adequate (A330);

c) Public Law 94-83 foreclosed appellants from raising the delegation issue (A330); and

d) The insert to the February 13, 1976 Broome County statement solved the segmentation problem. (A333-334).

In support of the motion appellees submitted voluminous affidavits (see A427, 463) purporting to show federal participation in preparing the environmental impact statements. As discussed below (pp 23-28), these affidavits tended to show just the opposite.

Appellants opposed the motion arguing principally:

a) The statements were generally inadequate (A358-361, 515-517);

b) Public Law 94-83 narrowed, but did not resolve for this case, the delegation issue and at the very least a genuine issue of fact remained for trial; (A354-356, 518-524) and

c) The segmentation issue remained because of the patent superficiality of the insert purporting to be a comprehensive I-88 environmental impact statement (A517-518).

The September 1976 Summary Judgment Decision

On September 27, 1976, from the bench, Judge Port orally delivered a decision (A527) vacating the 1973 preliminary injunction and granting summary judgment for appellees as to all of I-88 except for the three mile segment (PIN 9357.18) at the southwestern terminus of I-88 for which no environmental impact statement had ever been prepared.

On the issue of improper delegation of authority from FHWA to DOT, Judge Port did not discuss how he assessed FHWA's claims of participation. Instead he swept this issue away stating:

"The claim is made that there was inadequate federal participation and guidance. I have examined the papers. The papers have gone back and forth like a yo-yo. I can't come to that conclusion. I am led to just the opposite conclusion. The environmental impact statement for the north-east terminus [followed] extensive federal participation over a period of approximately five years. The federal and state officials met approximately once a month for about a year. I conclude that the federal officials have in fact provided the necessary guidance and participation contemplated by NEPA." (A540-541)

Judge Port did not explore into the content of these federal-state meetings to see whether they involved matters of substance. Nor did the Judge address the issue of federal involvement in the other two environmental impact statements before him covering I-88: (1) the comprehensive I-88 statement included as an insert to the Broome County statement and (2) the 1972 statement covering the yet unbuilt 45 mile Otsego/Schoharie segment.

Likewise, when it came to review the substantive inadequacy of the environmental impact statements, Judge Port again avoided grappling with the content of the statements stating:

"I can't nor I don't intend to detail all of the various statements that are claimed to be inadequate." (A537)

The mere existence of a document, voluminous on its face, seemed to satisfy Judge Port:

"I think that they pass. The volume alone mitigates against inadequacy. You would have to be pretty much of a genius at the use of language to fill up all these pages [--] there must be a foot of pages here on these impact statements [--] and say nothing or not comply with the things you are supposed to comply with, although I haven't passed on...[them] on that kind of scale." (A539).

Finally, Judge Port decided that the segmentation issue was resolved by the existence (not, apparently the content) of a document purporting to analyze the impacts of the whole of

I-88 stating only:

"The segment argument is made again, but it has less virtue now. This is being presented now for the entire eastern half of I-88 together with this comprehensive statement for the entire I-88." (A541).

and

"The comprehensive ~~statement~~ is faulted for being too general and lacking in detail. But it seems to me that that was the purpose, to provide the cement or adhesive to hold the whole thing together." (A537)

Based upon this decision, an order was entered on September 28, 1976 (A525) and this appeal followed.

What This Case Is Really About

The result of this case will turn on this Court's analysis of some relatively dry technical points of law, entirely separate from the merits of the I-88 proposal. Nevertheless, this Court should be aware of exactly what is at stake here and why its decision in this case will affect important rights and have far reaching and major significance.

The reason that appellants are fighting for the proper application of the NEPA process to the yet unbuilt portion of I-88 is that if a fair, objective analysis is made of the I-88 proposal, it will be seen to be an unnecessary, unmitigable

transportation, land use and environmental disaster. In fact, the effects of I-88 will be more on land use patterns and energy allocations (A261-266, 362-406, 502-506) than on transportation per se.*

In addition to the usual air (A70-74, 94-108, 481-485) and noise (A74-79, 485-486) pollution problems attendant to major highway projects, this case involves:

(1) The future viability of the rail freight system in New York State, a key profitable portion of which will be paralleled by I-88 (A81-82, 407-421).

(2) The threatened "Los Angelesization" of important food producing agricultural lands through freeway access; and

(3) The dispersal by sprawl of the population and services now clustered in the Albany-Schenectady Capitol District Area (A85-86).

This is what this case is about. A reversal of the Court below will force the responsible decisionmakers to face these key issues.

*Astonishingly, this multi-hundred million dollar superhighway will transport from end to end "less than 650 vehicles per day"!! (northeast terminus statement, p.5).

ARGUMENT

I

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE GENUINE ISSUES OF MATERIAL FACT EXIST AS TO THE EXTENT OF FEDERAL PARTICIPATION IN PREPARATION OF THE NEPA STATEMENTS

This case involves a review of the procedural adequacy of the processes by which three environmental impact statements* were prepared by DOT. The question presented is whether there was sufficient FHWA participation. The principal error of the Court below was to resolve this question by means of summary judgment rather than by a trial to determine the facts.

Judge Port seemed to treat this as strictly a legal issue, foreclosed by Public Law 94-83 upon a showing of any colorable federal involvement. This is incorrect. As discussed below, Public Law 94-83 requires a searching factual inquiry where an environmental impact statement under NEPA is prepared by a state agency to determine if

"...the responsible Federal official furnishes guidance and participates in such preparation [and] the responsible Federal official independently evaluates such statement prior to its approval and adoption..."
(42 U.S.C. §4332(2)(D)).

*(1) The 1972 Otsego/Schoharie segment statement, (2) The June 15, 1976 northeast statement and (3) The "comprehensive" insert to the February 13, 1976 Broome County statement.

The affidavits before Judge Port left open a genuine issue as to these material facts. Therefore, summary judgment was improper.

A. The Rule Against Delegation Was First Enunciated
By This Court in 1972

In Greene County Planning Board v. Federal Power Commission, 455 F.2d 412 (2d Cir. 1972), cert. den. 409 U.S. 849 (1972), this Court rejected the notion that a federal agency could delegate to an applicant (even a state agency) for federal action the responsibility under NEPA to prepare an environmental impact statement. In that case this Court held:

"The Federal Power Commission has abdicated a significant part of its responsibility by substituting the statement of PASNY [a state agency applicant] for its own. The Commission appears to be content to collate the comments of other federal agencies, its own staff and the intervenors and once again to act as an umpire. The danger of this procedure, and one obvious shortcoming, is the potential, if not likelihood, that all applicants' statement will be based upon self-serving assumptions". 455 F.2d at 420.

In Conservation Society of Southern Vermont v. Secretary, 508 F.2d 927 (2d Cir. 1974), this Court applied the Greene County "per se" ban on delegation from a federal agency to a license applicant to the situation in this case, prohibiting the delegation of NEPA duties by FHWA to a state highway department applicant for federal highway funds:

"Consideration of environmental factors in planning major federal projects has been deemed a high national priority. The duty of a federal agency under NEPA is to produce, as a part of a determination whether to proceed with a project, a detached and comprehensive analysis of the impact on the environment of such project.

"A state agency is established to pursue defined state goals. In attempting to secure federal approval of a project, self-serving assumptions may ineluctably color a state agency's presentation of the environmental data or influence its final recommendation. Transposing the federal duty to prepare the EIS to a state agency is thus unlikely to result in as dispassionate an appraisal of environmental consideration as the federal agency itself could produce."
508 F.2d at 930-931.

Thus, until August 9, 1975, the effective date of Public Law 94-83, it was perfectly clear in this Circuit that DOT could not prepare an environmental impact statement under NEPA on behalf of FHWA.

B. Public Law 94-83 Partially Changed The Rule
Against Delegation

With the enactment of Public Law 94-83, a delegation from FHWA to DOT was no longer per se a violation of NEPA. Public Law 94-83 provided that an environmental impact statement under NEPA

"for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official..."
[Emphasis supplied].

However, this was not a carte blanche for delegation because a number of conditions requiring continued federal involvement were attached:

"if,...

"(ii) the responsible Federal official furnishes guidance and participates in such participation,

"(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption,...

"The procedures of this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement..."

C. Public Law 94-83 Did Not Authorize A Federal Rubber Stamp Of State Decisions

Following the passage of Public Law 94-83, Conservation Society came back to this Court (531 F.2d 637, 2d Cir. 1976)). In considering the impact of that statute on the delegation rule, Judge Adams (sitting by designation) in dissent reviewed its legislative history:*

"There can be no doubt that the Court's previous decision in this matter...was the impetus for the congressional action that resulted in the addition of a new section 102(2)(D) to the National Environmental Policy Act (NEPA)...But my

*It should be noted that in Conservation Society Judge Oakes sitting in the District Court made an explicit finding of fact after a trial that there had been substantial federal guidance, participation and review in the state prepared environmental impact statement (362 F. Supp. at 629-630). In the instant case there was no trial, nor any such explicit finding of fact.

understanding of the intent of the Congress, as it is expressed in the amendatory language and illuminated by the legislative purpose was to modify and clarify the rigid standard that Congress perceived Conservation Society I had established for federal involvement in the preparation and drafting of the environmental impact statement (EIS). The intent was not simply to overturn that ruling or to repudiate altogether the requirement of substantial federal control of the EIS.

"To the extent that Greene County and Conservation Society I place an absolute prohibition upon delegation to the state agency of responsibilities to prepare the EIS, they have now been overruled by Congress. But my understanding of the congressional language is that a continuing and vital role by the federal agency in the preparation of the EIS is still contemplated.

"The meaning of the amendment is further clarified by a review of its legislative history... The content of the extensive floor debates and of the reports submitted to the two chambers of Congress by their respective committee reinforces the conclusion that the statutory language itself requires major federal involvement in the preparation of the EIS.

"As reported out of Committee, H.R. 3130 had provisions virtually identical to those now contained in section 102(2)(D) of NEPA. The purpose of the bill, the Committee wrote, 'is to clarify the application of NEPA to projects in which the state agency has prepared the EIS...

The Committee's understanding of the critical phrase 'furnishes guidance and participates in' was that it demonstrates an intent to 're-emphasize the basic precept of NEPA that Federal officials consider the environmental ramifications of proposed federal actions' [citation omitted]. In the committee's view, federal participation both extensive and effective is required in the drafting of the EIS [citation omitted]. The phrase 'independently evaluates' is intended to assure that the Federal agency consider, critically review and, when appropriate, change and supplement the work done by the state agency [citation omitted]. This analysis of the bill's provisions led the Committee to the conclusion that the bill would not disturb the 'basic logic' of Greene County—that delegation must be sufficiently limited to maintain federal accountability for decisions that affect the environment.

"Summarizing its understanding of the bill, the House Committee used the following forceful language:

"'[The bill] does not sanction a "rubber stamp" approach to Federal responsibilities, nor does it allow Federal functionaries to sidestep the other responsibilities placed upon them by law including, but not limited to, NEPA. What it does is to encourage adequate inputs of information by those best suited to develop that information, and to ensure that a continuing federal presence is mandated to fit that information into a rational and realistic planning and decision-making process. If enacted, H.R. 3130 would have this, and only this effect.' [citation omitted].

"The Senate Committee on Interior and Insular Affairs issued a report that made the same recommendations as the House Report. (S.Rep.No. 152, 94th Cong., 1st Sess. (1975)... Nowhere is it suggested that total, or even major delegation to state agencies be allowed; on the contrary, the importance of a continuing federal role is emphasized throughout.

"Express approval was given by the Senate Committee to the language of the House Report rejecting the notion that the bill allowed a 'rubber stamp' approach to the responsibilities

of the federal agency. [citation omitted]. Emphasizing the importance of the role of the federal agency in the preparation of the EIS, the committee concluded that '[t]he involvement of the Federal official should come early and at every critical stage in the preparation of the EIS, and should be substantial and continuous'. (Id).

"Both the House Report and the Senate Report thus make clear the congressional intent to retain a considerable, though not exclusive, federal role in the development of the EIS.

"By Public Law 94-83, Congress has now acted to allow the state agency to prepare the EIS under certain circumstances. But it has imposed a strict requirement of federal control in the process. The federal agency, according to the Congressional mandate, must guide the state agency during the preparation of the EIS. The federal agency must actively participate in that preparation. And the federal agency must review and evaluate the EIS independently, meeting its own responsibility to be fully accountable for the environmental ramifications of the proposed project. These are not duties that are fulfilled easily, or without substantial effort, input, and understanding. Congress has rejected the idea that the federal agency must perform all the work involved in preparing the EIS, but it has reaffirmed the principle that ultimate control must rest in federal hands." (531 F.2d at 640-644)

Thus, in federally aided highway cases, this Circuit's per se delegation rule was replaced, not by an opposite rule per se permitting delegation, but by a rule requiring a careful review of the actual facts surrounding the preparation of an environmental impact statement under NEPA by a state agency.

D. The Law Of This Case As Established In 1973 Called
For A Trial On The Delegation Issue

In 1973, Judge Port did not have the benefit of this Court's first decision in Conservation Society. Without citing Greene County, he nevertheless identified the delegation question as one to be addressed.

It is interesting that Judge Port's 1973 approach to delegation was more in accord with the subsequently passed Public Law 94-83 than with Greene County. Thus, in the 1973 preliminary injunction, Judge Port did not apply a per se to delegation test. Instead he held:

"There should be a trial to explore the probable issues involving environmental analysis, such as...whether the state or Federal agency was the party preparing these statements;..." (A298)

pointing out that

"'[A] thorough probing, in depth review' is preferable to a summary judgment which is an 'unusually inappropriate vehicle for the determination of the issues'" (A 297-298).

Consequently, in 1973 the law of this case was that the delegation issue had to be resolved following a trial to see what were the facts as to the federal involvement in the environmental impact statement preparation process. It is instructive here to repeat that the 1972 Otsego/Schoharie segment statement (which has remained unchanged to the present day) was expressly before the court below in 1973 and subject to its then holding that a trial on the question of delegation was required.

E. Nothing Happened Between 1973 and 1976 To Eliminate
The Need for a Trial on the Delegation Issue

In support of DOT's 1976 summary judgment motion, the appellees presented the District Court with the 1972 Otsego/Schoharie segment statement, the June 15, 1976 northeast terminus statement, the "comprehensive" insert to the February 13, 1976 Broome County statement and a voluminous series of affidavits and exhibits intended to demonstrate that there were no triable issues of material fact with respect to the extent of federal participation in the preparation of these documents.

However, a review of these submissions does not establish the requisite federal participation, and at best serves only to raise triable issues of fact. In fact, a close scrutiny of the appellees' affidavits on their faces alone would reveal that the federal participation alleged was in fact trivial and insubstantial and that if the facts were found at trial to be as alleged in these affidavits, appellants would be entitled to a judgment as a matter of law that appellees had not complied with the delegation standards set forth in NEPA as amended by Public Law 94-83.

The Affidavit of William A. Nostrand, Jr. sworn to June 14, 1976 (A427) in support of DOT's motion below undertakes to describe the federal participation in the preparation of the 1972 Otsego/Schoharie segment statement and the "comprehensive" insert to the February 13, 1976 Broome County statement. Paragraphs 7 through 28 of this affidavit describe an elaborate

consultation procedure which allegedly is the practice of FHWA under current regulations in working with the state highway agencies towards NEPA compliance. This procedure as alleged theoretically provides for a great deal of federal guidance and participation in EIS preparation, but according to the affidavits and exhibits provided herein, this procedure was not followed in fact in this case.

1. The Otsego/Schoharie Segment Statement

Concerning the actual federal participation in the development of the Otsego/Schoharie segment statement, the Nostrand affidavit candidly admits that

"While FHWA participation in the EIS preparation process was not in the depth presently required by FHWA regulations, or so documented, there was substantial participation in the project design and development analogous to the presently required FHWA participation." [Emphasis supplied]
[A 433]

The documentation provided demonstrates in fact that there was little meaningful FHWA guidance and participation in the development of the EIS itself. Most of the correspondence provided as exhibits deals with other FHWA approvals necessary for federal funding such as location approval, design approval and "§4(f)" approval (23 U.S.C. §128(f) requiring federal DOT approval of taking parklands for highway purposes). Only a few of the appended exhibits deal with the development of the Otsego/Schoharie segment statement itself and the majority of these are merely unilluminating letters of transmittal, or correspondence dealing with the procedural mechanics of document

preparation and distribution. The few letters from FHWA which facially consider the substance of the statement itself are much like the often superficial comments made by another substantially disinterested agency reviewing a statement covering subject matter generally outside its jurisdiction, and do not provide the requisite federal guidance, participation and independent evaluation required by law.

Mr. Nostrand's carefully couched position seemed to be that any State-Federal contacts concerning any and all federal approvals necessary for the highway segment in question could be considered "equivalent" to federal participation in the EIS analysis.

This argument obscures the statutory purposes of NEPA and the delegation guidelines pursuant to P.L. 94-83. These are designed to insure that environmental factors are considered by the responsible federal decisionmakers along with traditional technical, engineering and economic factors, and to insure that a largely state-prepared EIS is not plagued with self-serving biases. See e.g., Calvert Cliffs Coordinating Committee v. AEC, 449 F. 2d 1109 (D.C. Cir. 1971); Conservation Society, supra.

As documented by the FHWA's affidavit, the actual procedure used here provides neither assurance, since the FHWA relied solely on the state-prepared 1972 Otsego/Schoharie segment statement and information about the technical considerations of the project learned outside the NEPA process.

2. The Insert to the Broome County Statement

The Nostrand affidavit and exhibits of June 14, 1976 (A427 and exhibits) also seek to "document" the requisite federal participation in the development of the insert to the Broome County Statement. Again, a closer look at these documents should lead to the opposite conclusion.

Exhibits G-1 and G-2 indicate federal participation in the preparation of the draft "comprehensive" EIS only to the extent that FHWA approved of the state defendant's plans to undertake an additional statement and delegate the preparation of this document to consultants.

Although many other pieces of paper are appended to demonstrate federal participation in the "comprehensive" insert, a brief review will indicate that the vast majority are again merely bare transmittal letters, or concern that part of that EIS devoted specifically to the Oneonta Bypass and Broome County segments and not the insert purporting to deal with I-88 as a whole.

Only a few documents could be construed to show any federal participation concerning the contents of the insert whatsoever, and a reading of these would again lead to the conclusion that the federal participation was in reality trivial and incidental.

One exhibit (G-10) documents the "regional Multi-Disciplinary Environmental Task Force" meeting which Mr. Nostrand's affidavit (¶17-23, A430) informs us is the key part of the ultimate FHWA staff review. This meeting purportedly covering the comprehensive impact of a several hundred million dollar 123 mile Interstate highway, lasted a mere hour and twenty minutes. The meeting's

minutes (Ex. G-11) and subsequent FHWA comments on the "comprehensive" insert are overwhelmingly concerned with trivial technical errors made by the EIS drafters in citing names of government agencies and regulations. The substance of the insert does not appear to have been discussed at all. The other documents in Exhibit G do not materially concern the insert and add nothing to defendants' claim of federal participation.

3. The Northeast Terminus Statement

Similarly, the "Supplemental Affidavit" of William A. Nostrand, Jr. dated August 6, 1976 (A463) and supporting exhibit H purports to show federal participation in the development of the northeast terminus statement.

Again, most of the appended exhibits deal with federal participation in aspects of those projects other than NEPA, such as public hearings, location approval and §4(f) approval. The first document in Exhibit H which mentions any EIS at all (H-12) is the letter of transmittal of the completed draft environmental impact statement from the state defendants to the FHWA office. The documented federal "participation" is one-line letter (H-14) from the FHWA regional office that the draft EIS is "satisfactory" and a comment from the FHWA division engineer (h-15) that

"A further discussion of the effect of air pollution on the environment surrounding I-88 would be helpful. More information concerning pollution levels...would help to emphasize that all is being done to keep the environment clean."

In summary, defendants attempted to produce documentary evidence of federal participation in statement preparation and evaluation which they claimed would entitle them to the requested relief of summary judgment on the face of these papers alone. However, an examination of these documents by this Court will disclose that it is solely on the face of the papers that plaintiffs would be entitled to summary judgment. At most all defendant's papers do is to show that triable issues of fact exist as to the true extent of federal participation. The documents themselves are hardly dispositive of the issue.

F. The Grant of Summary Judgment Was Improper Where
Triable Issues Of Material Fact Existed

Federal Rule of Civil Procedure, 56(c), provides as to summary judgments:

"...the judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

The first judicial inquiry required by Rule 56 is whether a material issue of fact exists. Only if no such issue is found to exist does Rule 56 permit the immediate entry of judgment. Lemelson v. Ideal Toy Corporation, 408 F.2d 860 863 (2nd Cir. 1969), American Manufacturers Mutual Insurance Company v. American Broadcasting - Paramount Theatres, Inc.,

388 F.2d 272, 278 (2nd Cir. 1967); See also, 10 Wright and Miller §2725, and cases cited.

The function of a motion for summary judgment is, not to permit the court to decide issues of fact, but to determine whether there is an issue of fact to be tried. Aetna Ins. Co. v. Cooper Wells & Co., 234 F.2d 342, 345 (6th Cir. 1956).

As Judge Port pointed out in the 1973 preliminary injunction, the law under Rule 56 is well settled that "[A] thorough, probing, in-depth review" [of certain claims made by plaintiffs] is preferable to a summary judgment which is an "unusually inappropriate vehicle for the determination of the issues." (A.297-298, quoting, Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693 700 (2nd Cir. 1972).

Although Judge Port seemed to recognize the impropriety of deciding the simpler factual issue (as it was framed under existing law in 1973) of "whether the state or federal agency was the party preparing the statement", in 1976 without a trial he decided the much more complex factual question of whether there was substantial federal guidance, participation in and independent evaluation of the EIS's. This decision on the facts was made on the basis of the above mentioned controverted affidavits. No testimony subject to cross examination was taken in the District Court, nor was there any opportunity for discovery with respect to defendants' affidavits and exhibits introduced on this motion.

Deciding a novel and complex question of law on the issue of the required federal participation in environmental impact statement preparation requires a more concrete factual development

than was obtained from the affidavits from the motion below:

"Summary judgment, with ever lurking issues of fact, is always a treacherous shortcut, and in cases like these, too fragile a foundation for so heavy a load. Such relief is always discretionary, and in cases posing complex issues of fact and unsettled questions of law, sound judicial administration dictates that the Court withhold judgment until the whole factual structure stands upon a solid foundation of a plenary trial where the proof can be developed, questions answered, issues clearly focused and facts definitely found."

Petition of Bloomfield S.S. Co., 298 F. Supp 1239, 1242 (D.C. N.Y. 1969), aff'd. on other grounds 422 F.2d 728 (2nd Cir. 1970).

See also, Kennedy v. Silas Mason Co., 334 U.S. 249, 256-257 (1948); Columbia Broadcasting System, Inc. v. Teleprompter Corp. 251 F. Supp 302, 305 (D.C. N.Y. 1965); New York Stock Exchange v. Sloan, 394 F. Supp 1303, 1306 (D.C. N.Y. 1975).

In this action, the extent of federal guidance and participation were "material" issues of fact within the meaning of Rule 56(c) (Cf. American Manufacturers Mutual Insurance, supra at 279), whose resolution would clearly affect the outcome of the action. Where, as in this case, the evidence presented by affidavits on this summary judgment motion is subject to conflicting interpretations, or reasonable men might differ as to its significance, summary judgment is improper. See, Empire Electronics Co.

v. U.S. 311 F.2d 175, 180 (2nd Cir. 1962), 10 Wright and Miller §2725 n. 31. Further because Rule 56 does not permit "trial by affidavit", the self-serving affidavits of the federal defendants should not have been used by the District Court to resolve the factual issues at hand but merely to determine whether there were issues in dispute. Poller v. Columbia Broadcasting System Inc., 368 U.S. 464, 473 (1962); Colby v. Klune, 178 F.2d 872, 873 (2nd Cir. 1949).

"It is well settled that the party moving for summary judgment has the burden of demonstrating that the Rule 56(c) test - 'no genuine issue as to any material fact' - is satisfied. The movant is held to a stringent standard. Before summary judgment is granted it must be clear what the truth is and any doubt as to the existence of a genuine issue of material fact will be resolved against the movant. Because the burden is on the movant, the evidence presented to the Court always is construed in favor of the party opposing the motion and he is given the benefit of all favorable inferences that can be drawn from it. Finally, facts asserted by the party opposing the motion, if supported by affidavits or other evidentiary material, are regarded as true."

10 Wright and Miller §2727, and cases cited; See, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); First National Bank of Cincinnati v. Pepper, 454 F.2d 626, 629 (2nd. Cir. 1972).

G. Conclusion to Point I

Appellees fell far short of meeting their burden of showing that no genuine issues of material fact existed.

The Court should have not accepted defendants' self-serving allegations in their affidavits that they had indeed "participated" where those affidavits themselves raised grave doubts as to the validity of that participation.

In short, the grant of summary judgment below was improper, and this Court should reverse and remand this case to the District Court for a full examination of the facts and circumstances underlying the appellees' claim that they had complied with the NEPA delegation standards.

II

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO APPELLEES BECAUSE THE NEPA STATEMENTS WERE INADEQUATE AS A MATTER OF LAW

This case also involves the substantive adequacy of the three environmental impact statements before the District Court. Perhaps proving the validity of the fear this Court has always shown of statements prepared under a delegation to an applicant for Federal action, the statements in this case prepared by DOT are grossly deficient.

The mere existence of these statements will not satisfy NEPA's mandates. Therefore, to grant a summary judgment based upon the existence, rather than the contents, of the statements is improper.

A. NEPA Requires More Than A Document Labelled "Impact Statement"

The detailed statement under NEPA must set forth:

- "(i) the environmental impact of the proposed action,
- "(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- "(iii) alternatives to the proposed action,
- "(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- "(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." (42 U.S.C. §4332(2)(C))

The statement must substantively deal with these points:

"It should go without saying that the mere filing of a document labelled 'final impact statement' is

insufficient to shield an agency from judicial review if the document fails to comply with the standards outlined in NEPA". SCRAP v. U.S., 346 F. Supp. 189, 195 note 8 (D.D.C. 1972) remanded on other grounds sub nom, Aberdeen & Rockfish Ry. Co. v. SCRAP, 422 U.S. 289 (1975); See also, Monroe County Conservation, Inc. v. Volpe, 472 F. 2d 693 (2d Cir. 1972).

The standard calls for full disclosure:

"At the very least NEPA is an environmental full disclosure law...The "detailed statement" required by §102(2)(c) should, at a minimum, contain such information as will alert the President, the Council on Environmental Quality, the public, and, indeed the Congress, to all known possible environmental consequences of proposed agency action." [emphasis in original] EDF v. Corps of Engineers 325 F. Supp 728, 759 (E.D. Ark. 1970) aff'd 470 F.2d 289 (8 Cir. 1972).

The policy served by full disclosure is that those responsible for making the ultimate decision on a project, including the public, should have environmental information before them:

"[§102(2)(C),(D)]...seek to insure that each agency decisionmaker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance. Only in that fashion is it likely that the most intelligent, optimally beneficial decision will ultimately be made." Calvert Cliff's Coordinating Committee v. AEC, 449 F.2d 1109 (D.C. Cir. 1971) cert. denied, 404 U.S. 942 (1972)

The EIS must be sufficiently detailed to allow

"Those removed from the decision-making process to evaluate and balance the [environmental] factors on their own" and thus enable them to make an "informed choice".

Committee for Nuclear Responsibility v. Seaborg, 463 F.2d 783, 787 (D.C. Cir. 1971); EDF v. Tennessee Valley Authority, 339 F. Supp 806, 810 (1971 E.D. Tenn.), aff'd 486 F.2d 1164 (6th Cir. 1972).

For these reasons, courts have held that NEPA has not been complied with to the statutory standard of "the fullest extent possible" when there has been something

"...less than comprehensive and objective treatment by the responsible agency... Thus, an agency's consideration of environmental matters that is merely partial or performed in a superficial manner does not satisfy the requisite standard". EDF v. Corps of Engineers, 348 F. Supp 916 at 927 (N.D. Miss. 1972).

Environmental impact statements which are overly conclusory without a detailed discussion of the bases upon which the conclusions are reached have been struck down. City of New York v. U.S., 337 F. Supp 150, 159 (E.D. N.Y. 1971), Brooks v. Volpe, 350 F. Supp 269, 274 (W.D. Wash., 1972) (NEPA statement requires more than a "finding"; Congress changed "finding" to "detailed statement" so that administrators could not relegate environmental considerations to one more set of forms for signature.) See also EDF v. Froehlke, 473 F.2d 348 (8th Cir. 1972) and EDF v. Corps of Engineers, 470 F.2d 289 (8th Cir. 1972) cert. den. 412 U.S. 931 (1973).

This Court itself has never hesitated to review environmental impact statements for substantive adequacy and to halt federal actions proceeded by inadequate statements. Chelsea Neighborhood Associations v. U.S. Postal Service, 516 F.2d 378 (2d Cir. 1975); NRDC v. Callaway, 524 F.2d 79 (2d Cir. 1975).

Thus in I-291 Why? Association v. Burns, 517 F.2d 1077 (2d Cir. 1975) this Court upheld a preliminary injunction halting construction of a highway. After reviewing the actual contents of the environmental impact statement prepared for that highway, this Court stated:

"In light of the...inadequacies of the EIS, we affirm the grant of the motion for a preliminary injunction" (517 F.2d at).

In the instant case, a review of the contents of the environmental impact statements in question is called for. This review will show the substantive inadequacy of those statements.

B. The 1972 Otsego/Schoharie Segment Statement Lacks Adequate Detail To Satisfy NEPA

The most glaring defect in the 1972 Otsego/Schoharie segment statement is its failure to discuss the environmental impact and adverse environmental effects of the proposed action in sufficient detail to fulfill the key purpose of the statement as an "environmental full disclosure" device. e.g. Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972); Monroe County Conservation v. Volpe, supra.

The 1972 statement was drafted at an early time in the highway planning process when the plans had developed only to the point

of examining several alternative corridor "swaths" up to several miles wide. The final location, design and alignment of the proposed road had not been located within the chosen corridor, nor had the plans for interchanges, stream crossings, overpasses, earth cuts and fill or similar design features been developed. As a result, the 1972 statement suffers from a degree of vagueness and overgenerality which vitiates its purpose of informing the responsible decisionmakers, other commenting agencies and the public of what impacts the proposal will engender and how these impacts may be mitigated.

Instead of detailing how the proposal would affect future land use by the location and design of interchanges, or aquatic life and water resources by detailing the specifics of "realignment" of major streams, or air and noise pollution impacts by the design of the road relative to residential areas to name but a few serious impacts, the 1972 statement merely states in the most general terms that some impacts will occur in each of these areas.

Instead of offering specific proposals to mitigate these consequences for decisionmakers and the public to consider, the 1972 statement offers bland assurances that when design and construction are undertaken, DOT will consult with local and state agencies with expertise in these areas and plan the road so as to minimize adverse impacts.

Although the District Court decision correctly concludes (A537) that a valid basis for objection would have existed had

appellees waited until a late enough stage in the highway planning process to prepare an EIS where the EIS was merely a meaningless exercise in justifying a commitment to proceed with the project as proposed no matter what adverse impacts or alternatives were disclosed, it does not follow that by merely preparing a vague, uninformative document at a stage where little was known about the specific proposal that appellees have complied with NEPA's directive to integrate environmental considerations in the planning process. It is clear that a balance must be struck:

Statements must be written late enough in the development process to contain meaningful information, but they must be written early enough so that whatever information is contained can practically serve as an input into the decisionmaking process. Scientists' Institute For Public Information, Inc. v. AEC, 481 F.2d 1079, 1084 (D.C. Cir. 1973).

1. Other Agencies Found The Statement Too Vague
Even To Comment Upon

It is apparent from the comments contained in the 1972 statement that many, if not most, reviewing agencies believed that the document did not provide "meaningful information" upon which to comment. (See e.g. Army Corps of Engineers comment EIS p. 43, 75); New York State Department of Environmental Conservation Comment, (EIS p. 51, 80); Department of Interior Comment (pp. 117, 147) which noted:

"We believe that coordination is desirable at the corridor stage of project planning, but question the application and use of the environmental statement procedure to effect this coordination...we believe it would be more appropriate for the draft environmental statement to be prepared and circulated for

comment at the time when specific alignments and major design features are known and most environmental impacts can be specifically identified and discussed. In the event you proceed with this particular statement at this project stage, we believe a second environmental statement would be necessary to comply with [FHWA regulations]... and NEPA)."

Cf. Scientists Institute, supra, 481 F.2d 1079 at 1098 (supporting the possible need for a supplemental EIS where warranted), NRDC v. Calloway, supra and FHWA regulations 23 CFR §771.15.

Judge Port treated these comments from other agencies as proof that the system works:

"But it seems to me again that that is what the purpose of the distribution is, to give the other departments an opportunity to criticize and suggest...And the very fact that they are criticized and that there is give and take back and forth, I think establishes that the purposes of NEPA are being served and that the statements are adequate in their consideration rather than lacking."
(A537-538)

Unfortunately, once again, Judge Port focused on the existence of the criticism rather than the substance. The key criticism was that the 1972 statement was too deficient even to be commented upon.

Commentators have recognized this problem with respect to interagency review:

"There is another irony in the operation of the referral mechanism. A statement which is well-developed and presents usable data is much easier for an analyst to review than a statement which is so opaque and uninformative that the commentator must essentially start from scratch himself, collecting or producing the basic data. Thus, the quality of the comments on an impact statement is frequently proportional to the quality of the statement being commented upon. This is a new and sad variation of the old precept of 'garbage in, garbage out'". (Macbeth, The National Environmental Policy Act After Five Years, 2 Columbia Journal of Environmental Law 1, 17 (1975))

2. The Vagueness Extended To Other Aspects
As Well

Further, since the 18 page identification of environmental impacts is so sketchy, the other consideration mandated by NEPA §102(2)(C) and (D) which are designed to mitigate these impacts suffer as well. The nine pages devoted to discussing "alternatives", "unavoidable adverse effects", "relation between local short-term uses and long-term productivity" and "irreversible and irretrievable commitments of resources" (§102(2)(c) (ii-v)) are virtually useless in addressing the concerns required by the statute.

The "Unavoidable Adverse Environmental Effects" (p. 33) merely devotes one desultory sentence each to "Dislocation" and "Air and Noise Pollution" without providing enough information to judge whether these effects are meaningful, or could be ameliorated.

Likewise, the one page discussions addressed to the other NEPA concerns ("Relation Between Local Short-Term Uses and Long-Term Productivity", p. 39, "Irreversible and Irretrievable Commitment of Resources" p. 40 and "Actions Taken to Minimize Adverse Environmental Effects" p. 41) are merely very general, uninformative statements which assume the eventuality of the drastic changes which this proposal will work upon the economy, landscape and people of this region.

Similarly, final EIS discussion of land use impacts (pp. 14-16) follows the general approach of this document: noting without elaboration merely that some land use impacts will occur because of development pressures on vacant and agricultural land, facilitated by the highway. Aside from the debatable and unsupported conclusions that suburbanization of rural farmland is "desirable, and in keeping with the Appalachian (Regional Development) program", that the economic development benefits to the region outweigh social and environmental costs, and that final planning of interchanges and highway design will occur in "consultation with appropriate local officials", this section like many other in the EIS does not even attempt to detail the obvious land use impacts which will occur when two urbanized areas - Binghamton and the Capital District - are connected by a superhighway running through a rural area, facilitating suburbanization, removal of agricultural land from production and other secondary and "induced" development impact caused by this project.

It can be fairly said that after 30 years experience with superhighway construction and suburban sprawl, that these secondary impacts are far from speculative, that the specific highway design will induce these impacts in predictable ways, and that NEPA demands that these impacts be fully accounted for in a "...detailed statement..."

Appellants need not comment on the merits of the project except to point out that NEPA's purpose was to accord environmental factors a place alongside technical and economic factors in the decisionmaking process. A statement which facilely equates replacing farmland with suburbs as inevitable and desirable regional "growth" without taking a closer look at the social, economic and environmental costs and benefits of this action, as well as its own power through alternatives consideration to influence and channel these impacts has not done the job which Congress intended.

The "alternatives" section (p. 34-38) is devoted to discussing several alternatives in the broadest possible outline and concludes that the construction of a limited access highway in the chosen alternative corridor is the only viable alternative. Even assuming arguendo that the proper overall corridor was chosen, it is clear from the controversy and difficulties surrounding the few trial alignments developed for the §4(f) portion of the EIS (see EIS pp. 100-104) that many more alternatives exist in the later planning stages when the specific location and design of the

highway is chosen from among several candidates. Since DOT in the Otsego/Schoharie segment statement indicated that this design planning process will generate several alternative designs with differing environmental impacts and possible mitigating measures, this decisionmaking process should be subject to NEPA as well.

In short, as a matter of law the 1972 Otsego/Schoharie segment statement falls far short of satisfying the adequacy of detail which the Federal courts have required in a NEPA Statement.

C. The So-Called "Comprehensive" Insert Similarly Fails Meaningfully To Address The Overall Regional Impacts

DOT based its right to summary judgment as a matter of law in part on their recent preparation of a so-called "comprehensive" impact statement included as an insert to the 1976 environmental impact statement covering the Broome County segment.

Undoubtedly Defendants' interest in preparing such a "comprehensive" statement at this time was addressed to the "segmentation" issue broached by Judge Port in the 1973 preliminary injunction: whether defendants' segmental submission procedure impeded the environmental analysis function under NEPA (A298).

Appellants, and others critical of the FHWA procedures implementing NEPA, have argued that the division of a proposed interstate highway into several short projects for review

purposes makes it difficult for the entire highway project's impact to be considered as a whole. Such impacts as the overall roadway's effect on the regional (as opposed to purely local) environment, economy, community patterns, land use, recreational development and natural resources therefore go unaddressed in the NEPA process. The forest, in short, is mistaken for the studies of individual trees.

One would therefore expect that the "comprehensive" insert prepared by DOT would identify and resolve these regional impacts; however, it does not. This document suffers from the same maladies of vagueness, lack of informative detail and overgenerality as the Otsego-Schoharie segment statement previously discussed. If anything, the "comprehensive" insert is worse: not only does it seem to merely summarize and rehash the same unsupported conclusions presented in the previous "segment" impact statements, but it also adds no new information about the regional impacts of the entire I-88 project -- the sole rationale for its preparation.

1. Judge Port Misunderstood The Purpose of A Comprehensive Statement

Judge Port seemed completely to misunderstand the purpose of a comprehensive statement. Instead of recognizing that there may be cumulative or synergistic impacts from the whole, which may be significantly different than those apparent from merely adding up the parts, he treated the function of the comprehensive statement cavalierly:

"The comprehensive statement is faulted for being too general and vague. But it seems to me that that was the purpose,..." (A537)

Therefore, although it added nothing new, although it failed to address the impacts of the overall project, as distinct from the impacts of its segments, Judge Port concluded that the comprehensive insert passed muster.

Yet one of the key functions of the whole NEPA process was to make sure that federal agencies

"recognize the...long range character of environmental problems..." 42 U.S.C. §4332(2) (E)

This was based on a recognition that

"Important decisions concerning the use and shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades [citation omitted]" (Greene County Planning Board v. FPC, supra. F.2d at)

Therefore environmental impact statements are to be prepared

"with a view to the overall, cumulative impact of the action proposed, related Federal actions [etc.]" 40 CFR §1500.b(a)

Judge Port's analysis of the importance of the "comprehensive" insert was wrong. It should have been held to pass a more rigorous test. If it had been, it would have failed miserably.

2. The "Comprehensive" Insert Fails The Test

Although the "comprehensive" insert contains the same old assertions that I-88 will provide economic stimulus to the region, the effects of the project on land use -- especially replacing

agricultural land with low density suburban sprawl, community and social patterns, energy resources, air and water resources, wildlife, employment and other regional-scale impacts are unconsidered except in an overly broad and unilluminating fashion.

For instance, the insert goes no further in identifying and resolving most of the cited impacts than offhand references to "new pressures" on land allocation and unelaborated possible impacts on the regional watershed (see e.g. p. CS-50 through 53). A review of the "comprehensive" insert will disclose inadequacies, similar to the Negro-Schoharie statement.

Aside from the statutory text of NEPA itself and the interpretive case law previously discussed, administrative regulations of both the Council on Environmental Quality [40 CFR Part 1500, 38 FR 20550 (August 1, 1973)] and Federal Highway Administration (23 CFR Part 771, 39 FR 41805 (December 2, 1974) amended, 40 FR 60052 (December 31, 1975)] govern the content and preparation of highway impact statements. The latter regulations supersede the FHWA's earlier EIS preparation procedures outlined in "Policy and Procedure Memorandum 90-1" (Formerly, 23 CFR App. A (1971)).

The CEQ guidelines at 40 CFR §1500.8(a)(3)(ii) require "secondary" impacts of the sort to be expected from the overall I-88 project to be detailed in a "comprehensive" statement:

Secondary or indirect, as well as primary or direct, consequences for the environment should be included in the analysis. Many major Federal actions, in particular those that involve the construction or licensing of infrastructure investments (e.g., highways, airports, sewer systems,

water resource projects, etc.), stimulate or induce secondary effects, in the form of associated investments and changed patterns of social and economic activities. Such secondary effects, through their impacts on existing community facilities and activities, through inducing new facilities and activities, or through changes in natural conditions, may often be even more substantial than the primary effects of the original action itself. For example, the effects of the proposed action on population and growth may be among the more significant secondary effects. Such population and growth impacts should be estimated if expected to be significant (using data identified as indicated in §1500.8(a)(1) and an assessment made of the effect of any possible change in population patterns or growth upon the resource base, including land use, water, and public services, of the area in question.

It is clear that the "comprehensive" insert falls far short of this required level of analysis. Further, both the "comprehensive" insert and Otsego-Schoharie segment statements fail in almost every instance in addressing the items which the FHWA regulations at 23 CFR §771.18 require for each facet of the "detailed statement" mandated by NEPA.

They require environmental impact statements to contain detailed information and analysis of the project's specific design, economic and sociological impact, impact on land use planning, secondary or induced impacts, impacts on public facilities and esthetics, and other areas not specifically addressed in the instant statements. Further, the regulations set standards for the level of analysis required for each area of consideration.

An examination of some of the relevant FHWA regulations with respect to the content and level of detail required in a highway EIS is supportive of appellants' contention that both the Schoharie-Otsego segment statement and "comprehensive" insert are deficient as a matter of law. See e.g., 23 CFR §771.18(h) (land use planning); 23 CFR §771.18(i)(1) (Probable impact of the proposed action on the environment); 23 CFR §771.18(i)(2)(i), (National, ecological or scenic resources impact); 23 CFR §771.18(i)(2)(ii) (Relocation of individuals and families impact); 23 CFR §771.18(i)(2)(iii) (social impacts); 23 CFR §771.18(i)(2)(iv), (v) and (vi) (air, noise and water impacts).

To conclude, the mere existence of the environmental impact statements, no matter how weighty or voluminous they may appear on their face, cannot be deemed to comply with NEPA as a matter of law where the documents fail to address the factors enumerated in the statute and FHWA regulations and thus fail to fully disclose to the responsible federal decisionmakers, other commenting agencies and the public the environmental merits and demerits of the proposed action.

III

THE DISTRICT COURT ERRED
IN VACATING THE PRELIMINARY
INJUNCTION BECAUSE THE
CIRCUMSTANCES WHICH SUPPORTED
THE INJUNCTION IN 1973
ARE SUBSTANTIALLY UNCHANGED

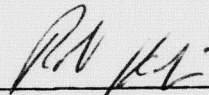
If appellants are correct that there has been an improper delegation and that the environmental impact statements are inadequate, then nothing material has changed since 1973, and the 1973 preliminary injunction should be reinstated.

CONCLUSION

The judgment of the District Court should be reversed, the preliminary injunction should be reinstated and this case should be remanded to the District Court (1) to try the issue of federal participation in the environmental impact statement process and (2) to review for adequacy the new environmental impact statements which will have to be prepared in order to obtain compliance with NEPA.

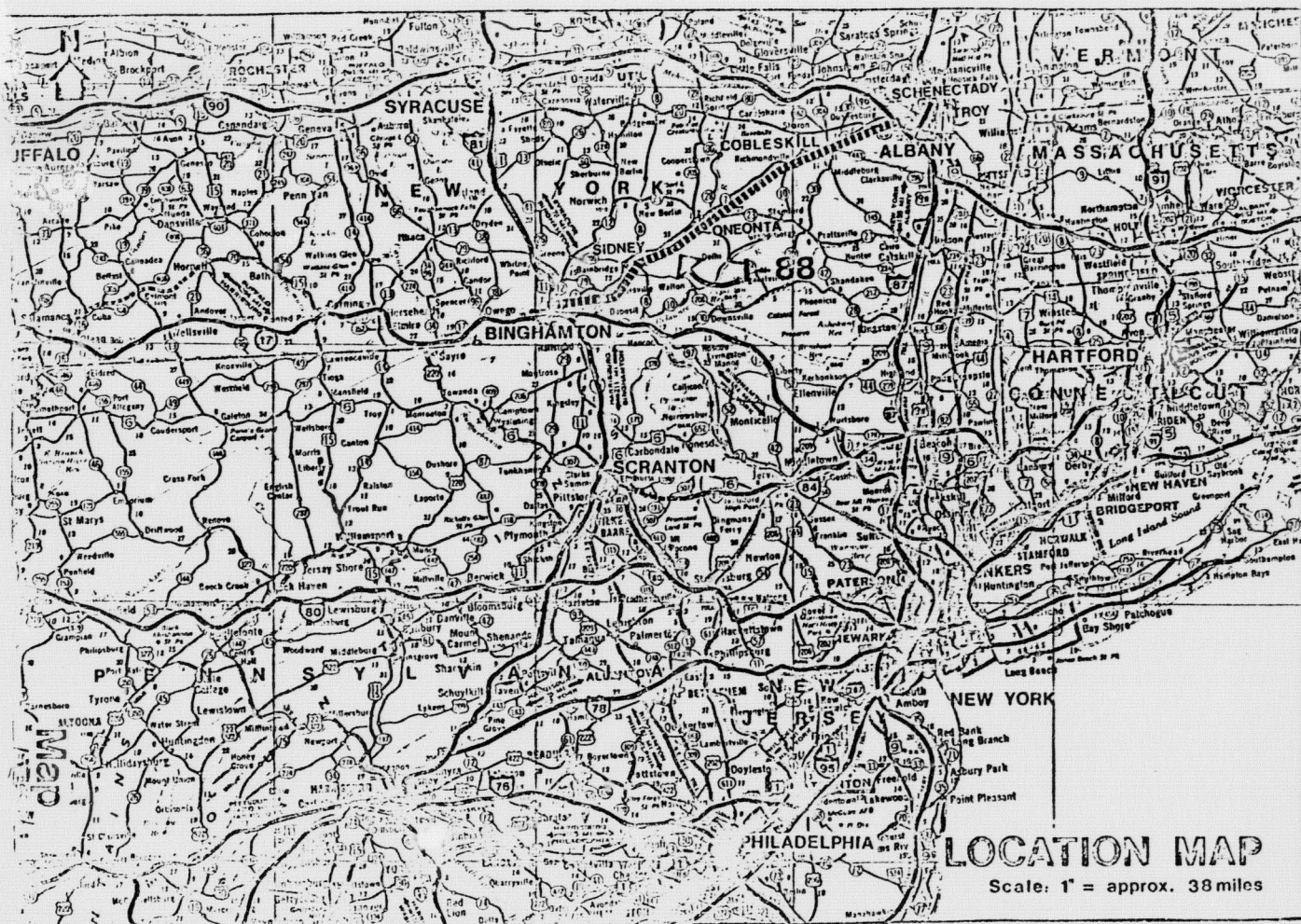
April 15, 1977

Respectfully submitted,



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Of Counsel



PUBLIC LAW 94-83

Public Law 94-83
94th Congress, H. R. 3130
August 9, 1975

An Act

To amend the National Environmental Policy Act of 1969 in order to clarify the procedures therein with respect to the preparation of environmental impact statements.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 102(2) of the National Environmental Policy Act of 1969 (83 Stat. 852) is amended by redesignating subparagraphs (D), (E), (F), (G), and (H) as subparagraphs (E), (F), (G), (H), and (I), respectively; and by adding immediately after subparagraph (C) the following new subparagraph:

Environmental
Impact state-
ments, prepara-
tion,
42 USC 4332.

"(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

"(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

"(ii) the responsible Federal official furnishes guidance and participates in such preparation,

"(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

"(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction."

Approved August 9, 1975.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 94-144 (Comm. on Merchant Marine and Fisheries) and No. 94-388 (Comm. of Conference).

SENATE REPORTS: No. 94-152 (Comm. on Interior and Insular Affairs) and 94-331 (Comm. of Conference).

CONGRESSIONAL RECORD, Vol. 121 (1975):

April 21, considered and passed House.

May 22, considered and passed Senate, amended.

July 25, Senate agreed to conference report.

July 29, House agreed to conference report.

89 STAT. 424

BEST COPY AVAILABLE

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the brief of Appellant Capital Region Citizens Committee by mailing two copies of same to each counsel at the addresses listed below:

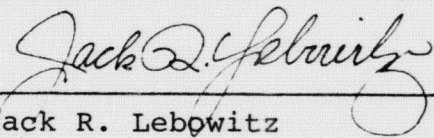
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April 15, 1977



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